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In the Supreme Court of the United States

OCTOBER TERM, 1973

JEROME B. HANSEN,

Petitioner,

vs.

JOHN C. AHLGRIMM and HARLEY BROWN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on November 14, 1973.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit was entered on November 14, 1973 and is set forth in the appendix, pp. 1-3 and the order of the same court on the Motion for Rehearing is set forth in the appendix, p. 8. The decision and the order of the

United States District Court for the Eastern District of Wisconsin was entered on April 27, 1973 and is set forth in the appendix, pp. 4-7.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW

What are the perimeters of judicial immunity under a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure directed to a complaint filed under 42 U.S.C. Sec. 1983 alleging action by a state judge in excess of his jurisdiction and pursuant to a conspiracy to violate the constitutional rights of a plaintiff by the issuance of an unlawful warrant for imprisonment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves 42 U.S.C. Sec. 1983, and Rule 12 of the Federal Rules of Civil Procedure.

2. The case involves Sections 274.11, 247.30, 274.17, 247.39, 295.03 of the Wisconsin Statutes.

STATEMENT OF THE CASE

On January 10, 1972 the petitioner filed a complaint in the United States District Court for the Eastern District of Wisconsin as set forth in the appendix, pp. 9-17. In due course the respondent moved under Rule 12 of the Federal Rules of Civil Procedure to dismiss the complaint for failure to set forth a cause of action. On the present-

ment of the issues and filing of briefs the District Court granted the motion of the respondent in the decision and order entered on April 27, 1973 set forth in the appendix, pp. 4-7. Petitioner timely prosecuted an appeal to the United States Court of Appeals for the Seventh Circuit, briefs were duly filed and on November 14, 1973 the Court of Appeals entered the order set forth in the appendix, pp. 1-3 under Rule 22 of the Federal Rules of Appellate Procedure. A Petition for Rehearing and a brief in support thereof set forth in the appendix, pp. 18-21 was timely filed and the Court of Appeals denied said petition by its order dated December 10, 1973 set forth in the appendix, p. 8. The remainder of the issues raised on appeal are as of this date pending argument and decision in the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ESTABLISHES A BLANKET JUDICIAL IMMUNITY UNDER 42 U.S.C. Sec. 1983—AN IMMUNITY CONTRARY TO THE CASE LAW PRECEDENT OF THE UNITED STATES SUPREME COURT.

The doctrine of judicial immunity[1] is not rooted in the Constitution of the United States. Rather it is inherited as a matter of common law and was adopted with carefully drawn guidelines by the United States Supreme Court in *Bradley* v. *Fisher*, (1872) 13 Wall. 335, 20 L.Ed. 646. The doctrine did not develop or embrace absolute immunity. From the beginning the liability of a judge has been recognized if he acts without jurisdiction.

Bradley v. *Fisher* involved incidents arising from the trial of John Suratt for the murder of Abraham Lincoln. The trial was marked by some acrimony and at its conclusion the trial judge entered an order striking the name of one of the defense attorneys from the role of the attorneys practicing in that court affecting his disbarment. The judge claimed that the attorney had threatened him in ex parte meetings. This order of the trial court was overturned on appeal and the attorney commenced a separate civil action for damages against the judge alleging

[1] For a discussion of the history and advisability of the rule as now recognized see 79 Yale Law Journal 322 (1969) *"Liability of Judicial Officers under Sec. 1983."*

malicious motive. Mr. Justice Field writing for the majority established a doctrine of limited judicial immunity directed precisely at the facts before the court and carefully distinguished those areas where a judge could be responsible for damages:

> ". . . judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority . . .
>
> The distinction here made between acts done in excess of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists, was taken by the court of King's bench, in *Ackerly* v. *Parkinson*, 3 M. & S. 411 . . . Mr. Justice Blanc said there was 'a material distinction between a case where a party

> comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;'. . .'' 13 Wall. 335, 351-353.

Applying the principles announced to the case before the court Justice Field found that the defendant Judge therein was indeed possessed of jurisdiction over the subject matter in order to render the judgment regardless of his motive or the apparent error of his judgment.

The holding of *Bradley* has not been diminished in any respect in the intervening years. The Circuit Court of Appeals for the Sixth Circuit spoke clearly on the concepts while sustaining the liability of a state judge for false imprisonment where the state judge was without jurisdiction in *Manning* v. *Ketcham,* (1932) 58 F.2d 942 as follows:

> ''. . . In determining the extent of the jurisdiction of its own courts, we will of course follow the decisions of the Court of Appeals of Kentucky. . .
>
> An affirmance results. When a judge acts in the clear absence of all jurisdiction, i.e. of authority to act officially over the subject-matter in hand, the proceeding is coram non judice. In such a case the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for the damages resulting from his unauthorized acts. Such has been the law from the days of the case of, The Marshalsea, 10 Coke 68. It was recognized as such in Bradley v. Fisher, 13 Wall. (80 U.S.) 335, 351, 20 L.Ed. 646. In State ex rel. Egan v. Wolever, 127 Ind. 306, 26 N.E. 762, 763, the court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge; the proceeding is as nothing.'

> In Rammage v. Kendall, 168 Ky. 26, 31, 181 S.W. 631, 634, L. R. A. 1916C, 1295 the Court of Appeals said: 'There is a general principle of universal application to all grades of judicial officers that a judge who is proceeding within the scope of his jurisdiction is not liable in an action for damages for the opinion he may deliver as such judge, nor for any rule or action he may take for the conduct of the business of this court. This principle, however, does not extend to make a judicial officer immune from damages for illegal acts which result in injuries to others or deprive them of their legal rights, when his acts are without the scope and limits of his jurisdiction. It follows that, if his illegal acts are without the scope and limits of his jurisdiction, he is liable, if damages result to others from such acts, whether he is actuated by malice, corrupt and impure motives or not. In the last state of the case the fact that his motives are impure and bad are considered only as aggravating the damages. When the judge acts illegally without the limits of his jurisdiction, he becames a trespasser, and is liable in damages as such. . .'
>
> Honesty of purpose and sincere belief that appellant was acting in the discharge of his official duty under his oath of office and for the public welfare is not available as a defense further than in mitigation of damages. . ." 58 F.2d at p. 949.

In 1959 the United States Supreme Court in *Barr* v. *Matteo*, 360 U.S. 564, 3 L.Ed. 2d 1434, 79 S.Ct. 1335 spoke to the issue in the context of congressional privilege from libel. Mr. Justice Harland speaking for a plurality of the court recognized the exceptions to immunity, quoting with approval the opinion of Judge Learned Hand in *Gregoire* v. *Biddle*, (CA 2 N.Y.) 177 F.2d 579, 581:

> ". . . The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they

> exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." 3 L.Ed. 2d at pp. 1441-1442.

In *Pierson* v. *Ray*, (1967) 386 U.S. 547, 18 L.Ed 2d 288, 87 S.Ct. 1213 the United States Supreme Court held that the doctrine of judicial immunity as outlined in *Bradley* applied in Civil Right cases brought under 42 U.S.C. Sec. 1983. However, Mr. Chief Justice Warren speaking for the eight member majority reannounced that the immunity attended only ". . . acts committed within their (judges) judicial jurisdiction as this court recognized when it adopted the doctrine in *Bradley*. . ." 18 L.Ed. 2d at p. 294, insert supplied.

Clearly then there is nothing in *Pierson* v. *Ray* which narrows the doctrine of judicial immunity as announced in *Bradley* in 1872. *Pierson* involved a situation where there was no claim that the judge acted without jurisdiction. In fact it was a matter of stipulated fact that the acts of the Judge defendant were within his jurisdiction.

The United States Court of Appeals for the Seventh Circuit has prior hereto evidenced clear understanding of the rule in *Jacobson* v. *Schaeffer*, (7th Cir. 1971) 441 F.2d 127 wherein Judge Duffy considers the history of the cases cited above and observes succinctly:

> "Jurisdiction then is the test and it too has been further refined. If a judge is viewed as acting 'in excess' of his jurisdiction, he still will be immune from suit. It is only when he has acted in the 'clear absence of all jurisdiction over the subject matter' that he may be sued for damages. *Bradley* v. *Fisher*, 13 Wall. 335, 351 (1871); *Rhodes* v. *Houston*, 202 F. Supp. 624 (1962). . ."

Also see *Skolnik* v. *Campbell*, (7th Cir. 1971) 454 F.2d 531.

A case most analogous to the instant case is *Wade* v. *Bethesda Hospital, et al.*, (1971 U.S. D.C. S.D. Ohio) 337 F. Supp. 671. In *Wade* the plaintiff complained against a state trial judge for violation of a constitutional right under 42 U.S.C. Sec. 1983 as a result of an order of the respondent judge that the petitioner be subject to surgical sterilization. The respondent judge claimed immunity on the basis that his order was within his power as a judge under the statutory scheme of the State of Ohio. In deciding that the respondent judge was not immune Judge Kinneary stated as follows:

> "We begin by defining the concept of jurisdiction as it is used in the context of judicial immunity. The cases are clear that the terms jurisdiction means that the judge must have both jurisdiction over the person and subject matter if he is to be immune from suit for an act performed in his judicial capacity. See, *Thompson* v. *Heither*, 235 F.2d 177 (6th Cir., 1956) and cases cited therein: *Ryan* v. *Scoggin*, 245 F.2d 54 (10th Cir. 1957). A third element, however, also enters into the concept of jurisdiction as used in this context. The particular decision which was given. See, *Cooper* v. *Reynolds*, 77 U.S. 308, 316 (1870); *National Malleable & Castings Co.* v. *Goodlet*, 195 F.2d 8 (7th Cir. 1952); *City of Phoenix* v. *Greer*, 29 P.2d 1062 (Supreme Ct., Ariz., 1934).

A judge will not lose his immunity because of a mere error in judgment even though the resultant act be in excess of the Court's jurisdiction. *Ryan* v. *Scoggin, supra; O'Bryan* v. *Chandler,* 352 F.2d 987 (10th Cir. 1965) *cert. den.* 384 U.S. 926, *rehearing den.* 385 U.S. 889. 'Excess of jurisdiction' as distinguished from entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, because conditions which alone authorize exercise of judicial power in the particular case are wanting and judicial power is not lawfully invoked. *Pogue* v. *Swink,* 284 S.W. 2d 868 (Supreme Ct. Mo. 1955).

Consequently, the third element in the concept of jurisdiction as used in the context of judicial immunity necessitates an inquiry into whether the defendant's action is authorized by any set of conditions or circumstances. This inquiry begins with an examination of the statutes under which defendant Gary presumed to act. . .

Defendant Gary found his authority to order sterilization in Section 5125.30, Ohio Revised Code, and in Section 2101.24, Ohio Revised Code. Section 5125.30 provides that when the hospitals for the mentally retarded are unable to receive additional patients, 'The probate judge shall then take such action as he deems necessary and advisable to provide for the detention, supervision, care and maintenance of said mentally retarded person. . .' Section 2101.24 sets out the jurisdiction of the probate court. Defendant Gary relied on the following language as providing authority for his order:

> 'The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.'

> It is the determination of this court that neither of these sections provided the defendant Gary with the conditions under Ohio law which would permit defendant Gary to order plaintiff to submit to sterilization, the Court determines that defendant Gary acted wholly without jurisdiction in this matter. Consequently, defendant Gary is not protected by the doctrine of judicial immunity."

It is obvious then that a judge is not immune from liability under 42 U.S.C. Sec. 1983 if the acts complained of were committed when the judge failed to have jurisdiction over the subject matter. The complaint in the case at bar alleged precisely such a situation and, therefore, it is respectfully submitted on its face was not the proper subject of a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure.

II

THE ORDER OF THE UNITED STATES CIRCUIT COURT FOR THE SEVENTH CIRCUIT AS ENTERED AFFIRMED WITHOUT EXPLAINING THE DECISION OF THE DISTRICT COURT ON UNSOUND LEGAL BASES IN TWO RESPECTS:

(1) An erroneous interpretation of applicable state law; and

(2) In violation of the principles governing Rule 12 of the Federal Rules of Civil Procedure.

The Court of Appeals in its decision appears to have decided that under *Freeman Printing Co.* v. *Luebke*, 36 Wis. 2d 298 (1967) and *Carpenter Baking Co.* v. *Bakery S.D. Local Union*, 237 Wis. 24, 37 (1941) that under Wis-

consin law trial courts retain jurisdiction to enforce judgments pending appeal. An analysis of *Freeman* and *Carpenter Baking* shows that Wisconsin law is exactly to the contrary. Both cases clearly state that the trial court, upon the perfection of an appeal to the Supreme Court (the situation that existed as a matter of undisputed fact in the case at bar) retains jurisdiction only for the limited purpose of preserving the status quo of the subject matter involved in the judgment appealed from that the part of the judgment which may be prohibitory in character remains in force and effect and is not stayed pending appeal. The issuance of the warrant complained of by the respondent judge was clearly an order beyond jurisdiction of the subject matter as defined under Wisconsin law. Section 274.11(4), Wis. Stats. provides:

> "The right of appeal shall exist from the time of the entry of the appealable order or judgment and *in cases of appeal the supreme court shall have jurisdiction over the subject matter of the action from that time.* The procedural requirements of subs. (1), (2) and (3) and of this chapter shall relate only to the jurisdiction of the court over the parties to the appeal." [Emphasis supplied]

For the respondent judge to have retained jurisdiction it is necessary that a specific Wisconsin statute be relied upon for there is no dispute between the parties that the warrant for arrest was entered after the petitioner had perfected an appeal to the Wisconsin Supreme Court. The parties briefed the question of the statutory authority *vel non* for both the District Court and the Circuit Court of Appeals and in the Petition for Rehearing the petitioner requested clarification from the Circuit Court of Appeals as to what sections of Wisconsin statutory law were to

be held to allow the warrant as entered. See appendix, pp. 18-21. It is respectfully submitted that the opinion entered did not respond to the issue as framed.

Concerning the procedural requirements of a motion under Rule 12 of the Federal Rules of Civil Procedure it is clear that the only issue to be considered on the motion was whether the *complaint* alleges the acts of the respondent judge to be committed without subject matter jurisdiction. The complaint in the case at bar does so allege and as stated above an analysis of the case law precedent and statutory law of the State of Wisconsin clearly reveals that at the time the respondent judge issued the warrant for the arrest of the petitioner he lacked jurisdiction over the subject matter.

It is apparent that the district court failed to properly apply the rules obtaining in deciding the issue on a motion under Rule 12(b) of the Federal Rules of Civil Procedure.

On a motion to dismiss brought pursuant to Rule 12(b) the allegations of the complaint must be viewed in the light most favorable to the petitioner, assuming the truth of the factual allegations contained therein. *Conley* v. *Gibson*, (1957) 335 U.S. 41, 45-48, 2 L.Ed. 2d 80, 78 S.Ct. 99. On appeal from dismissal for failure to state a claim on which relief can be granted the court of appeals must accept as true petitioner's allegations of facts, together with such reasonable inferences as may be drawn in petitioner's favor. *Murray* v. *The City of Milford*, (C.A. 2nd 1967) 380 F.2d 468; *Barnes* v. *Merritt*, (C.A. 5th 1967) 376 F.2d 8; *Mississippi River Fuel Corp.* v. *Slayton*, (C.A. 8th 1966) 359 F.2d 106. Factual issues are not to be determined on a motion to dismiss. *Scozzafava* v. *U.S.*, (S.D. N.Y. 1961) 199 F.Supp. 43.

The complaint in the case at bar alleged precisely that the respondents acting in concert and "ACTING WITHOUT JURISDICTION UNDER THE LAWS OF THE STATE OF WISCONSIN" effectuated the issuance of an illegal warrant of arrest for the plaintiff—see ¶ 11, 12, 13, 14 and 15 of the complaint, appendix, pp. 11-12.

The decision of the district court commences with the assertion that the procedures requested, which resulted in the warrant of arrest, "were quite common and had long been provided for by the Wisconsin Statutes. Wis. Stats. §§ 247.30 and 274.17." Support for that assertion could not be found on the record before the district court. The conclusion is unfounded and unsupported by a reading of those statutes cited.

The petitioner had perfected an appeal from the judgment rendered against him in the divorce and thus under Wisconsin law the respondent had no jurisdiction over the subject matter of the corpus of the judgment.

> "An appeal from a judgment or order strips the trial court of jurisdiction with respect to the subject matter of the judgment or order, except in certain unsubstantial and trivial matters, and the supreme court then has jurisdiction until the appeal has been determined. The reason for this rule is that, once the appeal has been taken, the trial court ought not to have the power to do anything that might adversely affect the rights and interests of the parties in the appeal." *Estate of Mayer,* (1966) 29 Wis. 2d 497, pp. 504-505.

See also *Gateway City Transfer Co., Inc.* v. *Public Service Commissioner,* (1948) 253 Wis. 229.

The statutes cited by the district court are absolutely silent regarding vesting any jurisdiction of the state trial court for the purpose of compelling the satisfaction of the judgment or the posting of surety therefore.

Sec. 274.17 Wis. Stats. provides that an appeal shall not automatically stay execution of a judgment, which merely allows a prevailing party to seek civil execution under Chapter 272 Wis. Stats. if a stay is not obtained. NOTHING CAN BE READ INTO THE STATUTE WHICH CAN PUT A LITIGANT IN PERIL OR JEOPARDY OF ARREST OR IMPRISONMENT FOR FAILURE TO OBTAIN A STAY OF EXECUTION ON A MONEY JUDGMENT. Any statute so providing would be of doubtful constitutionality for it would in effect provide imprisonment for debt.

Sec. 247.39 Wis. Stats. is completely immaterial to the issues. It provides merely that on appeal alimony or support may be allowed during the pendency of the appeal under Wisconsin Supreme Court Rule 251.72. In the case at bar there were no children and no alimony award.

In like manner §247.37 Wis. Stats. cited by the district court in conjunction with §295.03 Wis. Stats. as authority for commitment of the plaintiff to jail, refers in its pertinent parts *exclusively* to alimony or support orders. Again that statute is irrelevant because the instant case involved no alimony or support issue or order.

Sec. 295.03 Wis. Stats. carefully outlines those narrow areas for which a party can be held in contempt and relate again to orders concerning alimony or support in divorce cases and orders for suit costs in other cases. The warrant for arrest in the case at bar was not based upon any failure contemplated in §295.03 Wis. Stats. on the record before the district court.

Therefore, it is respectfully submitted that there was not under Wisconsin Statutes any "common and long provided for" procedure which authorized a commitment

order or warrant of arrest for the appellant. To the contrary there was absolutely no authority for such an order.

Significant, of course, from the standpoint of the procedure involved, is that the analysis of this body of Wisconsin law vis-a-vis the rationale which the district court ascribed to the defendants was not properly considered on a motion to dismiss under Rule 12(b). The decision as made was made in a factual vacuum. The complaint recited that the defendant acting in concert and *WITHOUT* jurisdiction effected an illegal warrant for the arrest of the appellant. On a motion to dismiss pursuant to Rule 12 those allegations must be accepted as true and could only be challenged on a motion for summary judgment pursuant to Rule 56. The insertion of a statutory scheme and the interpretation thereof as a defense to the complaint necessitates the consideration of matters outside the pleadings—in such circumstances the proper procedure to join the issues is Rule 56. To quote the Per Curiam opinion of the United States Supreme Court in *Carter* v. *Stanton,* (1972) 405 U.S. 669, 31 L.Ed. 2d 569, 92 S.Ct. 1232:

> ". . . it appears that at the hearing on the motion to dismiss, which was based in part on the asserted failure 'to state a claim upon which relief can be granted', . . . matters outside the pleadings were presented and not excluded by the court. The court was therefore required by Rule 12(b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. Under Rule 56, summary judgment as to any material fact and the moving party is entitled to judgment as a matter of law. If this is the course the District Court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim.

> In this posture of the case, we are unconvinced that summary judgment was properly entered. The judgment of the District Court is therefore vacated and the case is remanded to that court for proceedings herewith." 31 L.Ed. 2d at p. 572.

The district court in the decision improperly considered matters outside of the complaint and inserted an affirmative defense based upon interpretation of the Wisconsin Statutes which were assumed to have been made by the respondent.

Since the resolution of the motion involved the consideration of matters de hors the record the motion was one traditionally denominated a "speaking motion", 2A Moore's Federal Practice, pp. 2287-2313. As Moore notes such a motion is properly to be treated as a motion for summary judgment and the provisions of Rule 56 of the Federal Rules of Civil Procedure apply. Issues of jurisdiction can be involved in "speaking motions" and in those instances the parties should be afforded the opportunity to adduce evidence on that issue. *Collins* v. *New York Cent. Sys.*, (CA D.C. 1963) 327 F.2d 880, 7 FR. Serv. 2d 12b. 22, Case 2; *Harmon* v. *Supreme Court of Cal.* (CA 9th 1962) 307 F.2d 796, 6 FR. Serv. 2d 12b. 22, Case 3.

Of course, the most obvious evidence to be considered would be the testimony of the respondents which the petitioner had proposed to obtain via the depositions. The district court in its decision created for the respondents an absolute immunity without a scintilla of evidence presented that the acts of the respondent were justified under any interpretation of Wisconsin law.

CONCLUSION

For the reasons stated above certiorari should be granted and the order of the United States Court of Appeals for the Seventh Circuit dated November 14, 1973 should be reversed.

Respectfully submitted,

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